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IN THE

Supreme Court of the United States

..... TERM, 19.....

No. 651

WILLIAM L. BURNS AND MABLE BURNS,
Petitioners,

vs.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION,
Respondent.

PETITION OF WILLIAM L. BURNS AND MABLE BURNS FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION OF WILLIAM L. BURNS AND MABLE BURNS FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioners William L. Burns and Mable Burns, respectfully pray for the writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that court entered on the 8th day of December 1949.

(Petitioners are sometimes referred to herein as plaintiffs, and respondent as defendant.)

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed TRANSCRIPT OF RECORD.)

Plaintiffs, petitioners, residents and citizens of Michigan, are the beneficiaries of a $5,000.00 life policy issued by defendant, respondent, which insured the life of their son, Robert W. Burns. On August 30, 1941, being the date of the making of the application and supplement to application (the latter being designated "aviation" supplement), insured was a *civilian*. The policy was issued September 13, 1941. World War II commenced December 7, 1941. Thereafter the insured, Robert W. Burns, became a flight officer in the army of the United States. On June 7, 1943, when the policy was in full force and effect and while in the line of *military duty* as a passenger in an army transport plane being transported from one army base to another, the plane exploded in mid-air and the insured was killed.

This suit was instituted by plaintiffs, petitioners to recover the $5,000.00 with accrued interest. Defendant, respondent, defends on the ground that the aviation exclusion clause of the policy covers both military and civilian aviation risks, and that its liability is limited to the cash reserve of $84.32.

It is established and conceded that the insurance policy is a Michigan contract of insurance. Therefore, it is governed by the statutes and laws of Michigan applicable thereto.

The District Court determined the issue in favor of defendant, wrote an opinion (32) and entered judgment for

plaintiffs (45, 46) for the reserve value of $84.32 only. Plaintiffs' motion for new trial was denied (52, 53). On appeal by plaintiffs, the United States Court of Appeals, affirmed but did not write an opinion. Copy of the affirming judgment of the Court of Appeals is attached to the Transcript of Record filed herein and to the conclusion of our annexed Brief, as an appendix.

Exhibit D is the aviation supplement to the application for the policy (9), expressly supplementing the previous application and "to be taken and considered as a part of the said application and these particulars are to be taken as a whole, and considered as the basis of the contract for insurance" (9). The insured indicated that during the previous 12 months he had made as a pilot two flights of approximately two hours duration and approximately 120 miles (10), but that at date of application his license had expired (10, 11). The following questions and answers in the supplemental application are set forth in full (11, 29, 30):

> "5. a. Do you hold a pilot's license? (If so, give license classification, date of license, and total solo hours flown.) a. No Expired.
>
> b. Have you had any training in operating an aeroplane or airship of any kind? (If so, give latest license classification, date of license and total solo hours flown.) b. Yes—license #2866640 1—Land Private pilot—solo 22 hours.
>
> c. Do you contemplate any training in operating an aeroplane or airship of any kind? (If so, give details.) c. No.
>
> d. Do you own an aeroplane or airship of any kind, or contemplate ownership? d. No.
>
> e. Does the business with which you are connected maintain an aeroplane or airship for use of its officers or employees? e. No.
>
> 6. Are you connected in any way with (a) Government or State aviation units, (b) with aeronautical manufacture, sales, or financing, (c) with establish-

ment or maintenance of an airport, or (d) with an aero or flying club? (Give full details.)—6. (a) No. (b)..... (c)..... (d).....

7. Do you intend to fly in a privately owned plane or one owned by your employer? If so, give

(a) Probable number of annual flights. a. None.

8. State fully your present intentions and attitude toward personal flying in the future, mentioning contemplated flights, their relative number as compared with the past, etc.—License has expired, don't expect to renew it." (11, 30)

The Aviation Clause:

Exhibit E (12) is the aviation clause which is part of the supplemental application and follows question 8 (11, 30):

> "Death occurring by reason of any aerial flight or journey is not a risk assumed by the Company, except to the extent of the entire reserve, less any indebtedness, on this Policy or on any Extended Insurance hereunder. If the Insured at the time of such flight shall be a fare-paying passenger in course of transportation from one definite terminal to another by means of an aerial conveyance in charge of a licensed pilot, this provision shall not be effective."

The policy contained the standard provision that the policy and the appended applications "constitute the entire contract between the parties" (31).

The following incontestability clause is contained in the policy:

> "Except for non-payment of Premium, this Policy will become incontestable one year after its date of issue, if the Insured be then living; or, if the Insured be not then living, two years after its date of issue." (31).

The attention of the Court is invited to the fact that the policy did not contain any military exclusion clause what-

ever. As will be pointed out in the argument portion of this brief, *Michigan law at the time of issuance of the policy permitted the insertion of a civilian exclusion clause only.* Further, petitioners contend and point out that the contractual intent of the parties manifested in the whole contract clearly establishes that only civilian aviation was to be excluded from coverage, and not military aviation in which insured came to his death; likewise, that an analysis of the applicable cases and authorities is convincing that said aviation exclusion clause of the policy in the case at bar applies solely to civilian and not to military aviation.

Among the findings of the District Court is that while on an authorized flight from one army base to another, the insured was a passenger of a plane which "exploded and fell" killing all passengers and crew (32).

The District Court further ruled that while the incontestability provision of the policy did *not* exclude risks relating to "military services in time of war", the aviation clause covered military aviation as well as private flying (35), (38).

OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Michigan, Northern Division is reported in 79 Fed. Supp. 847, and appears in the Transcript of Record in the case, which is furnished herewith. No opinion was rendered by the United States Court of Appeals except the memorandum opinion which is included in the judgment entered by the court, affirming the opinion and judgment of the District Court. Said decision of the United States Court of Appeals is appended to and made a part of the Record filed herewith, and is attached as an appendix hereto.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED.

1. Whether *"death occurring by reason of any aerial flight or journey"* contained in the exclusion clause of a life insurance policy, was properly construed to apply to death of the assured resulting from an aerial flight as part of and in the line of military duty in time of war, *the policy fully covering death in military service.*

2. Since the policy covers military risks, whether it must be construed as covering everything encompassed within the term, including the risks incident to military aviation.

3. Whether the aviation exclusion clause of the policy applies *solely to civilian* aviation.

4. Whether in view of the Michigan Statute, the Aviation Exclusion Clause in the policy could be applied to death in an airplane while insured was in the military service and where the flight in the plane which caused the death was part of the assured's military duty.

5. Whether, in view of the pronouncement of this Court in the cases of:

Accident Ins. Co. v. *Crandall,* 120 U. S. 527, 30 L. Ed. 740, 7 Sup. Ct. 685.

Aschenbrenner v. *U. S. Fidelity & Guaranty Co.,* 292 U. S. 80, 84, 78 L. Ed. 1137, 54 Sup. Ct. 590.

Stipcich v. *Metropolitan Life Ins. Co.,* 277 U. S. 311, 72 L. Ed. 895, 48 Sup. Ct. 512.

and the Michigan Supreme Court decisions, to the effect that if the language and phraseology of contracts of insurance is reasonably open to two constructions, the more favorable to the insured will be adopted, the Court below erred in failing to apply such rule, to the policy in question.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT OF CERTIORARI.

1. The decision of the Court below is in conflict not only with the applicable decisions of this Court, (*Accident Ins. Co.* v. *Crandal*, 120 U. S. 527; *Aschenbrenner* v. *U. S. Fidelity & Guaranty Co.*, 292 U. S. 80; *Stipcich* v. *Metropolitan Life Ins. Co.*, 277 U. S. 311; cited *infra*), but also the decisions of all other Federal Courts, the Michigan Supreme Court and the leading American Texts on the Rule of *Statutory Construction.*

2. The subject matter and the final judgment in this proceeding is of great importance and public concern in that it involves the question of the effect which the call of a citizen to the highest service of his country has on contracts affecting the domestic and economic life of its citizens and which involves the construction of words of a life insurance policy along lines never contemplated when the contract was entered into.*

3. Because the District Court and United States Court of Appeals in so affirming, cite cases in support of the

* Apropos hereto is the concept of this Court expressed by Mr. Justice Cardozo in the case of *Burnet* v. *Wells*, 289 U. S. 670, 681, 77 L. Ed. 1439, 53 Sup. Ct. 761, 765:

> "Insurance for dependents is today in the thought of many a pressing social duty. Even if not a duty it is a common item in the family budget, kept up very often at the cost of painful sacrifice, and abandoned only under dire compulsion."

judgment in favor of defendant, which, when analyzed, do not support said judgment, but are in sharp conflict therewith, and actually sustain plaintiffs' contention and judgment in their favor.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed, and that petitioners be granted judgment in their favor and such other and further relief as may seem proper.

SOLOMON W. PATEK,
RALPH E. HELPER,
MOSES LEVITAN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF THE PETITION.

SPECIFICATIONS OF ERRORS.

The Court of Appeals erred:

1. In affirming the judgment of the District Court upon the grounds and for the reasons set out in said opinion of the District Court.

2. In failing to determine and adjudge that the contractual intent of the parties manifested by the whole contract was to insure military aviation risks and that such were not excluded by the aviation clause of the policy.

3. In adjudging and determining that the aviation exemption or exclusion clause was intended to exempt a military aviation risk in war, notwithstanding the policy covered and insured all military risks.

4. In failing to adjudge and determine that under the Michigan Statutes, Act No. 59 of the Public Acts of 1939 as *amended* by Act No. 81 of the Public Acts of 1943, the law in effect when this policy was issued in September 1941, limited aviation exemption and exclusion clauses to *civilian* aviation only.

5. In failing to apply the well established rule of statutory construction as laid down by all the other Federal Courts, the Michigan Supreme Court, and the leading American Texts on Statutory Construction, that because of the change of the 1939 statute by the amendatory statute of 1943, a presumption of a material change in the 1939 law by the 1943 statute resulted, and that only civilian aviation exclusion clauses were permitted under the former

law and not until 1943 were military and naval service exclusion clauses permitted to be incorporated in the policies of insurance.

6. In failing to apply the unanimity of expression by this Court and of the Michigan Supreme Court of the rule that if the language of a contract of insurance is ambiguous or reasonably open to two constructions, the more favorable to the insured and which will sustain recovery, will be adopted.

7. In accepting and thus applying the cases cited by District Court in support of the judgment for defendant, which cases when analyzed, do not support said judgment, but are in sharp conflict therewith, and actually sustain plaintiff's contentions and judgment in their favor.

STATEMENT OF THE CASE.

A Statement of the Case is covered by our Summary and Short Statement of the Matter Involved, found at pages 2 to 5, *supra*.

SUMMARY OF ARGUMENT.

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed TRANSCRIPT OF RECORD.)

1. Robert W. Burns procured a $5,000.00 life insurance policy from defendant on September 13, 1941; he was then a civilian. World War II did not commence until December 7, 1941. The insured thereafter became a flight officer in the U. S. Army. On June 7, 1943, while on a military flight, the plane exploded and he was killed. In the Supplement to the Application for the policy, dated August 30, 1941 (designated "Aviation") (11, 28, 30) question 8 thereof reads: "State fully your present intentions and attitude toward PERSONAL flying in the future" (11, 30). This is immediately followed by the Aviation Clause involved in this suit (11) being the same as the clause attached to the policy (12). The policy is very comprehensive in coverage and covers death due to any and all types of military service and duties. Likewise, the policy is a Michigan contract. The Michigan incontestability statute Section 12,427 (3) compiled Laws of 1929, Mich. Annotated Statute, Section 24.263, Sec. 3, (third) page 651, permitted the insurer to except from coverage, death due to *naval and military* services in time of war; however, the insurer, respondent herein did not insert same in the incontestability provision of this policy (31). It is clearly apparent that the *contractual intent* of the parties which is manifested by the whole contract, is, that the policy insures *military* aviation risks and that such were not excluded by the aviation clause of the policy.

2. The aviation exemption or exclusion clause of this policy does not exempt or exclude death resulting from *military* aviation, but applies solely to civilian aviation. There is a clear and well recognized distinction between

military aviation exclusion clauses on the one hand, and civilian aviation exclusion clauses, on the other hand.

3. The Michigan Statutes:

Conformably to the Michigan Statutes, Act. No. 59 of the Public Acts of 1939 as *amended* by Act. No. 81 of the Public Acts of 1943, the law in effect when this policy was issued in September 1941, limited aviation exemption and exclusion clauses to *civilian* aviation only.

4. Rule of Statutory Construction:

Pursuant to the well established rule of statutory construction laid down by all the other Federal Courts, the Michigan Supreme Court, and the leading American Texts on Statutory Construction, it is clear that because of the change of the 1939 statute by the amendatory statute of 1943, a presumption of a material change in the 1939 law by the 1943 statute resulted, and only civilian aviation exclusion clauses were permitted under the former law. Not until 1943, *subsequent* to the issuance of this policy, were military and naval service exclusion clauses permitted to be incorporated in the policies of insurance.

5. Rule of Construction of Language of Insurance Contracts:

The unanimity of expression of this Court and of the Michigan Supreme Court is, that if and when the language of a contract of insurance is ambiguous or reasonably open to two constructions, the one more favorable to the insured and which will sustain recovery, will be adopted.

6. Analysis of the Cases:

The cases cited by the District Court and accepted and so applied by the Court of Appeals in the instant case in support of the judgment for defendant herein, when analyzed, do not support said judgment, but are in sharp conflict therewith, and actually sustain plaintiffs' contentions and a judgment in their favor.

ARGUMENT.

I.

The Contractual Intent of the Parties Is Manifested in the Whole Contract and Establishes That Only Civilian Aviation Was to be Excluded From Coverage, and Not Military Aviation in Which Assured Came to His Death.

This can be gathered from the four corners of the policy which includes the Supplement to Application (28-30) namely, the one that pertains to "Aviation" and is so designated in the upper right hand corner thereof.

Let us now refer to questions 7 and 8 of said Supplement to Application (30) and the answers thereto:

> "7. Do you intend to fly in a *privately* owned plane or one owned by your employer? If so, give (a) Probable number of annual of flights.
> "a. None.
>
> "8. State fully your present intentions and attitude toward *personal* flying in the future, mentioning contemplated flights, their relative number as compared with the past, etc.
> "License has expired. Don't expect to renew it."

Then immediately following the above, is the *Aviation Clause* provision as part of said Supplement to Application (30) which is identical with the Aviation Clause affixed to the Policy (27-28).

Likewise, when this policy was issued September 13, *1941,* the defendant had the right to insert in its *incontestability* clause the exception "except for violations of the policy relating to *naval and military* services in time of war," and this would have included aviation service in the Air Corps. The defendant did not take advantage of

this provision, because there was an apparent *meeting of the minds* on the part of the insured and the company, that the aviation exclusion rider pertained only to *civilian* flying.

The Michigan incontestability statute is section 12427 (3) C. L. 1929, Mich. Ann. Stat. Section 24.263, sec. 3, (Third) page 651.

The only exception of the Incontestability clause of the instant policy is limited to non-payment of premium (31).

Further with regard to *intent* and the *meeting of the minds* of the parties:

In *Rogers* v. *Great Northern Life Ins. Co.*, 284 Mich. 660, 667, 279 N. W. 906, the Court said:

> "Insurance policies, like other contracts, are to be construed as a whole. The intent of the parties is to be gathered from the four corners of the instrument. *Girard Fire & Marine Ins. Co.* v. *Scott*, 265 Mich. 293. While courts will not write a new contract for the parties, they will construe insurance contracts in a reasonable manner so as to avoid forfeitures * * *."

In *Mondou* v. *Lincoln Mutual Casualty Co.*, 283 Mich. 353, 358, 278 N. W. 94, the Court said:

> "Worship of the literal should not overcome common sense or be used to bring about an absurdity if it can be avoided in construing an insurance policy."

In the recent case of *Moulton* v. *Sobdell-Emery Mfg. Co.*, 322 Mich. 307, 33 N. W. (2nd) 804, 806, the Court held:

> "Manifest intent of parties to contract prevails over literal intention of terms."

and said (page 806):

> "To ascertain such intent, it 'should be construed in the light of the circumstances existing at the time it was made.' *Kellogg* v. *Kellogg* (*Toasted*) *Corn Flake Co.*, 212 Mich. 95, 114, 180 N. W. 397, 403. In doing so,

we 'must look to the purpose sought to be accomplished,' *Hess* v. *Haas,* 230 Mich. 646, 651, 203 N. W. 471, 472, and 'uphold, and enforce the rights and duties that spring from the real intention of the parties.' 21 C. J. p. 204. Its 'manifest intent must prevail over the literal sense of terms.' *Township of Stambaugh* v. *Iron County Treasurer,* 153 Mich. 104, 107, 116 N. W. 569, 571.

"'And in order that the court may see just how the transaction came about and received the shape it actually bears, a reference is proper to the surrounding facts. * * * There is no requirement to adhere to the literal terms in derogation of the interior sense of the transaction.' *Stuart* v. *Worden,* 42 Mich. 154, 160, 3 N. W. 876, 880."

II.

Death of an Army Flight Officer When on Military Flight Is Insured By a Life Policy Covering Military Risks, and Is Not Excluded From Coverage By an Aviation Rider or Clause Which Can Apply Only to Civilian Aviation. There Is a Clear Distinction Between Military Aviation Exclusion Clauses and Civilian Aviation Exclusion.

In this case, plaintiffs, petitioners, contend and urge that the aviation exclusion clause of the policy (27, 28) applies solely to civilian aviation and not to aviation and death while assured was in the military service. And, there is no question but what assured was, at the time of his death on June 7, 1943, a Flight Officer in the United States Army, in the Military service of the United States. Such is undisputed. It is further undisputed that at the time of the making of the application for the insurance coverage as well the SUPPLEMENT TO THE APPLICATION on August 30, 1941, the assured Robert W. Burns, was a *civilian.*

We respectfully submit that the courts below erred in

construing the aviation clause to include both civilian and military aviation.

Our contention in this regard is made clear and sustained by the cases of:

Conaway v. *Life Ins. Co. of Va.*, 148 Ohio St. 598, 76 N. E. (2nd) 284 (1947).

Durland v. *New York Life Ins. Co.*, 186 Misc. 580, 61 N. Y. Supp. (2nd) 700 (1946).

Paradies v. *Travelers Ins. Co.*, 183 Misc. 887, 52 N. Y. Supp. (2nd) 290.

Schifter v. *Commercial Travelers Acc. Assn.*, 183 Misc. 74, 50 N. Y. Supp. (2nd) 376; affirmed 269 App. Div. 706, 54 N. Y. Supp. (2nd) 408; appeal denied 294 N. Y. 645, 61 N. E. (2nd) 460.

Sovereign Camp Woodmen v. *Compton*, 140 Ark. 313, 215 S. W. 672.

In the *Conaway* case, *supra*, the policy endorsement also read: "Death as a result directly or indirectly of service, travel or flight in or on any species of aircraft * * *."

Insured met his death while in the Naval Air Corps on a plane which plunged into the sea.

The Ohio Supreme Court affirmed judgment in favor of the beneficiaries, construing said aviation clause of the policy to apply to civilian aviation only, holding:

> "Where life policy specifically excluded war risk from double indemnity feature of policy, there was no *mention of war in aviation clause*, and questionnaire submitted to insured before the policy was written inquiring concerning aviation hazard of insured *related to civilian activities* of insured, inference was authorized that policy *did not exclude military aviation.*"
>
> "A life policy which excludes *civilian* aviation risks will *not* be construed to exclude *military aviation risks in time of war unless clearly so expressed.*"

In the *Durland* case, *supra*, the New York Court said:

"HAD THE CONTRACT CONTAINED ONLY THE MILITARY OR NAVAL SERVICE CLAUSE AND THE AVIATION RIDER, IT MIGHT WELL BE A SUFFICIENT AMBIGUITY WOULD BE PRESENTED TO PERMIT THE CONSTRUCTION THAT INSURED WAS COVERED IN ALL RISKS IN THE NAVAL SERVICE INCLUDING AVIATION, AND FURTHER, THAT THE AVIATION RIDER WAS INTENDED TO RELATE ONLY TO CIVILIAN AVIATION."

61 N. Y. Supp. (2nd) at page 702.

Citing the Compton, Paradies and Schifter cases, *supra.*

In that case the Aviation Rider also provided "* * * death of the insured as a result directly or indirectly from operating or riding in any kind of aircraft."

In the *Paradies* case, *supra*, the policy also contained an aviation clause excluding liability on account thereof; and the New York Court said:

"Let's take a look at the clause in question. It tells the insured if you travel by air, the company is not liable in the event of your death, unless you travel under circumstances that are outlined in your policy. This provision gave insured a decision, a choice or an option and put him on his guard that if he traveled any other way by air and met his death, or if he was killed while flying with a stunt pilot, or a sky rider or with a private aviator, he would not be protected under the policy.

"This, to my mind means CIVILIAN flying either business or pleasure, because the very next clause mentions 'except for violation of the conditions of the contract relating to military or naval service * * * if such service shall be restricted by endorsement hereon at date of issue.'

"There is no such endorsement on the policy. There is a restriction on the additional indemnity contract that the company will pay provided such death does not result from '(c) any act of war'. No claim is made for recovery on this clause by plaintiff herein."

52 N. Y. Supp. (2nd) pages 291-292.

In this case plaintiff was killed in action while performing duties as a bombardier on a military airplane.

In the *Paradies* case, the Court further added:

> "In this case, Lieutenant Paradies followed the colors into the shock of invasion. He is a military casualty. He was in a plane, that's true, when he met his death. If he were killed in a foxhole, on a landing beach, or lost at sea, I am certain the defendant would have paid without question under this policy, so under the circumstances I feel substantial justice requires me to say: Plaintiff's motion for summary judgment is granted."
>
> 52 N. Y. Supp. (2nd) at page 292.

In the *Schifter* case, *supra,* the New York Court held:

> "Where insured's death was result of air crash which occurred while he was taking flight training in the army within the United States, death was covered by rider upon accident policy extending coverage to insureds who entered military service while training in the United States, notwithstanding policy contained exclusion clause for death resulting from aerial flight if insured was not a passenger in licensed commercial airplane."

In the *Compton* case, *supra,* the Arkansas Court held:

> "The occupation of aviation prohibited by constitution of beneficial association held, especially in view of other parts of constitution, to be private occupation, and not service in aviation branch of army."

III.

Michigan Statutory Provisions Relating to Aviation Exclusion Clauses Govern and Control Policy Exclusion Clauses.

If it is to be implied or presumed that the aviation exclusion clause of the policy in the instant Burns case, applies so as to exclude liability on account of death resulting in both cases, namely:

(1) while in the *military* service, and
(2) *civilian* flying,

then the policy provision goes beyond the statutory authority therefor, since Act No. 59 of the Public Acts of 1939 of Michigan applies only to *civilian* flying as we point out herein; and insofar as the *policy* provision exceeds the *statutory* provision in respect thereto, the statute governs and the policy can only apply to civilian flying. A recent and well stated authority for our position, is the New York Court of Appeals decision of *Franklin* v. *John Hancock Mutual Life Insurance Co.*, 298 N. Y. 81, 80 N. E. (2nd) 746 (July 1948). In that case the court held:

> "A *clause in life policy* limiting amount payable to beneficiary to premiums paid if insured shall die within two years from date of issue of policy by self-destruction while *sane or insane* was less favorable to beneficiary than *statutory clause* excluding insurers' liability beyond amount of reserve less any indebtedness on policy for death due to *suicide* occurring within two years from date of issue of policy, and hence approval by superintendent of insurance of clause in policy was without effect and policy would be enforced as if the *statutory clause* were the only suicide proviso set forth in the policy."

The Court in the *Franklin* case, *supra*, therefore held

that the Superintendent of Insurance did not have authority to approve the exclusion clause of the policy, because that clause was obviously less favorable to the plaintiff than the statutory exclusion clause, and that the statute required the enforcement of the policy as if the statutory exclusion clause were the only suicide proviso set forth therein.

In the case of *Metropolitan Life Ins. Co.* v. *Conway*, 252 N. Y. 449, 169 N. E. 642, the court held:

> "Where policy or rider is not approved by superintendent of insurance such policy or rider is not invalid *ipso facto*, unless in conflict with provisions exacted by STATUTE, AND IT IS INVALID EVEN THEN TO EXTENT OF CONFLICT, and no farther, SINCE STATUTE READS ITSELF INTO CONTRACT AND DISPLACES INCONSISTENT TERMS."

To the same effect are the cases of:

> *Prillaman* v. *Century Indemnity Co.*, 49 Fed. Supp. 197 affirmed 138 Fed. (2d) 821.
>
> *Id Harrison* v. *Carroll* (Employers Liability Assurance Corp.), 139 Fed. (2d) 427.

The *Prillaman* case holds:

> "The Virginia *statute* requiring automobile liability policy to cover insured and any person legally using automobile with permission of owner must be considered as part of the contract of insurance issued in Virginia *irrespective* of any *inconsistent* provisions of *policy*."

At the Time the Instant Policy Was Issued, Michigan Law Did Not Permit the Exclusion of Military Aviation, But Permitted Only the Exclusion of Civilian Flying.

Likewise, we contend that Act No. 59 of Public Acts of *1939* (Fourth) being Section 12428 (Fourth) Mason's 1940 Cum. Supp. Compiled Laws of Michigan of 1929, which

relates to exclusion clauses which insurers could insert in or attach to their policy, limits such clauses to *civilian* aviation only. Said statute provides:

> "Nothing contained in this subsection nor in subsection 3 of the preceding section *relating to incontestability,* shall be construed as prohibiting a life insurance company from placing in its policies a provision or rider limiting its liability with respect to risks incident to aviation: Provided, That no limitation shall be made with respect to fare-paying passengers of *commercial airlines* flying on regularly scheduled routes between definitely established airports. And provided further, That the liability of the company under such a provision or rider shall in no event be fixed at an amount less than the full reserve of the policy and any dividend additions thereunder, less any indebtedness on or secured by such policy."

The policy in the instant case was issued in September 1941, and therefore, the above mentioned statute of 1939, which was in effect prior to said date, is applicable here.

The 1943 Amendment.

Act No. 81 of the Public Acts of *1943* (Fourth), being Section 12427 (4) (Fourth) Mason's 1945 Cumm. Supp., Compiled Laws of Michigan of 1929, Ann. Stat. section 24.263 (4) (Fourth) which *amends* said Act No. 59 Public Acts of *1939 supra,* provides:

> "Nothing contained in this subsection nor in subsection 3 of section 3 of this chapter relating to incontestability, shall be construed as prohibiting a life insurance company from placing in its policies provisions limiting its liability with respect to
>
> (a) Death resulting from aviation other than as fare-paying passenger on a regularly scheduled route between definitely established airports:
>
> (b) *Military or naval service:*
>
> and provided further, That if the liability of the company is limited as herein provided, the liability shall

in no event be fixed at an amount less than the reserve on the policy (including the reserve for any dividend additions thereto and excluding the reserve for any additional benefits in the event of death by accident or accidental means or for benefits in event of any type of disability), less any indebtedness on or secured by such policy." (Italics by the writer.)

Act No. 81, Public Acts of 1943.

Thus, the foregoing amendment of *1943* which includes the infantry, cavalry, aviation (air corps), etc., services and duties, in time of peace, as well as war, *for the first time* permits insurers to add exclusion clauses covering aviation and other services and duties in the *military* or naval service. In other words, it is apparent that sub-paragraph "(a)" of Act No. 81, of the Public Acts of *1943* refers *solely* to *civilian* aviation as does Act No. 59 of *1939*, and the legislature apparently noting and observing that Act No. 59 of the Public Acts of *1939* made no provision permitting insurance companies to incorporate in the exclusion clause of its policies a provision limiting liability with respect to *military or naval service*, deemed it necessary to add sub-paragraph "(b)" to Act No. 81 of the Public Acts of *1943*. This would seem to definitely establish that Act No. 59 of P. A. 1939 simply refers to *civilian* aviation, as does sub-paragraph (a) of Act 81 of Public Acts of 1943, and in order to provide in the exclusion clause of the policy a provision pertaining to aviation and all other services and duties in the *military* or naval service, it was deemed necessary to add sub-paragraph (b) to Act 81 of the Public Acts of *1943*.

We here deem it apropos to observe that World War II commenced December 7, 1941. We were not at war when Act No. 59 of the Public Acts of 1939 was passed. However, we were at war when Act No. 81 of the Public Acts of 1943 was adopted, and which amended Act No. 59 of 1939 so as to permit insurers to attach riders or incor-

porate in their policies clauses excluding aviation risks in the military and naval service. (Subsection (b) of Act No. 81 of the Public Acts of 1943.) And we quote from contention of the insurer in the case of *Boye* v. *United Service Life Ins. Co.*, 168 Fed. (2nd) 570:

> "Anyway, it has been the practice of the insurance industry for many years except in times of war or of impending war to refrain from excluding hazards incident to war." 168 Fed. (2nd) at page 570.

> "The court is not at liberty to read into the statute provisions which the legislature did not see fit to incorporate, nor may it enlarge the scope of its provisions by an unwarranted interpretation of the language used."
>
> *Ford Motor Co.* v. *Appeal Bd. of Mich. Unemp. Comp. Com'n*, 316 Mich. 468, 25 N. W. (2d) 586, at pages 587-588.

The Doctrines of Ejusdem Generis and Noscitur a Sociis.

Another reason why we assert that the provisions of Act No. 59 of the Public Acts of 1939 all apply exclusively to civilian flying is, that the *first* portion of that provision referring to "risks incident to aviation" must be correlated to and made to harmonize with the language of the proviso thereof, namely, "fare-paying passengers of *commercial* airlines flying on regularly scheduled routes between definitely established airports." *A fortiori,* Act No. 81 of 1943, contains subsections "a" and "b". The former subsection is of like import and serves the same purposes as Act No. 59 of 1939, while subsection "b" *for the first time* clearly indicates the legislative intent to also cover *naval and military* aviation in the aviation exclusion clause; otherwise, *why* and *what is the purpose and reason* for the express language in this regard found in Act 81 of 1943 which amends said Act 59 of 1939? The

doctrine *ejusdem generis* applies to Act 59 of 1939 so as to restrict its provisions to *civilian* aviation. In the case of:

Heckathorn v. *Heckathorn*, 284 Mich. 677, 280 N. W. 79,

the Court said:

"Words and clauses in different parts of a statute must be read so as to harmonize with the subject-matter and general purpose of the statute. If the general meaning and object of the statute be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to that purpose. The mere literal construction ought not to prevail if it is opposed to the intention of the legislature apparent from the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effected, the law requires that construction to be adopted. 2 Lewis' Sutherland, Statutory Construction (2d Ed.), Sec. 370."

The following will be noted in 50 Am. Jur. Sec. 247, pages 241, 243.

"The meaning of statutory terms depends upon the connection in which they are used, and in the interpretation thereof, the doctrine of construction, *noscitur a sociis,* prevails."

Id: 50 Am. Jur. Sec. 249, pages 244-246.

RULES OF STATUTORY CONSTRUCTION.

The Effect on the Amendment of Act No. 59 of the Public Acts of Michigan of 1939, of Act No. 81 of the Public Acts of 1943 Was to Change the Former Law. The 1939 Statute Which Was in Effect When This Policy Was Issued, Permitted Only Civilian Aviation Exclusion Clauses: In 1943 Naval and Military Aviation Exclusion Clauses Were Added to the Statute. Likewise, If There Is Any Ambiguity in Respect to These Statutes, Such Must Be Resolved in Favor of Plaintiffs.

We are convinced that the CHANGE in the statutes by such amendment demonstrates that only CIVILIAN aviation exclusion clauses and riders in life insurance contracts were permitted up to the year *1943*, and that the *1941* contract in the instant *Burns* case, contained such aviation exclusion rider which did and could only apply, in any event to CIVILIAN aviation; that the decisions of the other Federal Courts and of the Michigan Supreme Court, as well as the leading American Texts on Statutory Construction, all cited by us, profoundly so hold and determine.

On the other hand, and aside from the foregoing, any *ambiguity* in the foregoing respect must also resolve itself in favor of plaintiffs and the 1939 statute and amendatory 1943 statute, be given that construction which is most favorable to plaintiffs and which will sustain the claim of plaintiffs Burns.

We have already pointed out in this Brief what we believe the Legislature must have had in mind when it added subparagraph (b) to Act No. 81 of *1943* so as to permit the Exclusion Clauses of policies to extend and apply to aviation in the military and naval service; that it is our view that subparagraph (a) of said Act applies to *civilian* aviation only, the same as Act No. 59 of 1939.

We here desire to amplify and support our position in this regard by submitting the following rules of statutory construction:

Presumption of Intent to Change Law:

"It will be presumed that the legislature, in adopting the amendment, intended to make some change in the existing law, and, therefore, the courts will endeavor to give some effect to the amendment."

59 C. J. Sec. 647, page 1097.

Citing: *United States* v. *Southern Pac. Ry.* 230 Fed. 270.

U. S. v. *Bashaw,* 50 Fed. 749, 754, 1 C. C. A. 653.

In *United States* v. *Southern Pac. Ry.,* 230 Fed. 270, the court said (p. 275):

"For Congress to change the wording of the statute without intending to change its effect would be worse than useless. In this instance it would be an absurd act. The Court must assume that Congress acted intelligently, and intended something other than absurdity by what was done."

The above *Southern Pac. Ry.* case is cited in:

Felin v. *Kyle,* 22 Fed. Supp. 556, 559.

U. S. v. *Board of Commissioners,* 26 Fed. Supp. 270, 274,

in which last mentioned case the court said:

"* * * the amendment was enacted for the definite purpose of changing the existing law."

In *U. S.* v. *Bashaw,* 50 Fed. 749, *supra,* the Court said:

"The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language used."

This *Bashaw* case last above mentioned is cited and followed in the case of:

Allen v. *Multnomah County,* 179 Ore. 561, 173 Pac. (2nd) 475 (Oct. 1946)

in which case the Oregon Court said: (173 Pac. (2nd) at page 481):

"He relies upon the well-established rule that it is not to be presumed that the legislature did a vain thing when it amended the statute."

Citing: 50 Am. Jur. (Statutes) Sec. 275.

In 50 Am. Jur. Sec. 275, *supra,* is the following:

"• • • the presumption is that every amendment of a statute is made to effect some purpose, and effect must be given the amended law in a manner consistent with the amendment. The general rule is that a change in phraseology indicates persuasively, and raises a presumption that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change."

In Section 1930, Sutherland Statutory Construction, 3rd Ed. (Horack), it is said:

"PRESUMPTION OF CHANGE:

Because it is defined as an act *that changes an existing statute,* the courts have declared that the mere fact that the legislature enacts an *amendment* indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights. Thus, in interpreting an amendatory act there is a presumption of change in legal rights. This is a rule peculiar to amendments and other acts purporting to change the existing statutory law. *Thus, it is presumed* that the provisions added by amendment were *not included* in the original act."

In *Detroit Edison Co.* v. *State,* 320 Mich. 506, 31 N. W. (2nd) 809, the Court said:

"In approaching the question of law involved, we do not consider the wisdom or the policy of the legislature in the enactment. The function of the court is to apply the fundamental rules of statutory construction and thereby seek to determine the legislative intent. If the language of the statute is plain and unambiguous, no interpretation is necessary."

31 N. W. (2nd) at page 813.

Id: *Wickham* v. *Carlton Twp. School Dist.,* 325 Mich. 94, 37 N. W. (2nd) 770, 772 (June, 1949).

In Crawford, Statutory Construction, Sec. 304, page 618, it is said:

CONSTRUCTION OF AMENDATORY ACTS:

"Indeed, the mere fact that the legislature enacts an amendment is of itself an indication of an intention, as a general rule, to alter the pre-existing law."

"The Legislative Purpose: Perhaps the reason was to remedy some existing evil or to correct some defect in existing law, or to create a new right or remedy."

Crawford, Statutory Construction, Sec. 161, p. 247.

"Moreover, in construing the amended statute, the court should consider the change sought to be effected by the legislature."

Crawford, Statutory Construction, Sec. 304, p. 619.

In the case of:

School Dist. No. 6, Paris & Wyoming Twps. v. *Kent County,* 284 Mich. 132, 278 N. W. 792, cited in Crawford, *supra,* Sec. 161,

the Court said:

"In determining the meaning of this statute * * * it is necessary to consider other statutes which may have preceded it or which relate to the same subject * * * The presumption is that the Legislature

had a *definite purpose* in passing the statute in question."

278 N. W., at page 797.

"Courts should not attribute to the legislature the enactment of a statute devoid of purpose. The court cannot attribute to the legislature an intent which is not in any way expressed in the statute."

59 C. J. Sec. 569, page 958.

IV.

Rules of Construction of Insurance Contracts:

A. If Language and Clauses Are Reasonably Open to Two Constructions, That Most Favorable to Insured Will Be Adopted so as to Permit Recovery.

B. Any and All Ambiguities Herein as Between the Matters of (I) The Intent of the Parties; (II) The Michigan Statutes; (III) The Purport and Effect of the Change in the Michigan Statute Law in 1943 Which Amends the 1939 Law, etc., on the One Hand, and the Provision of the Aviation Exclusion Clause of This Policy, on the Other Hand, Must Be Resolved in Favor of Plaintiffs, Petitioners, So as to Permit Recovery by Them of the Full Face Amount of the Policy.

"The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, the more favorable to the insured will be adopted. * * *."

Aschenbrenner v. *U. S. Fidelity & Guaranty Co.*, 292 U. S. 80, 84, 85, 54 S. Ct. 590, 592, 78 L. Ed. 1137.

"They (insurance policies) are prepared by the insurer and if, with equal reason, (the clauses) open to two constructions, that most favorable to the insured will be adopted."

Stipcich v. *Metropolitan Life Ins. Co.*, 277 U. S. 311, 72 L. Ed. 895, 48 Sup. Ct. 512.

"* * * and it cannot be so applied without disregarding the fundamental rule of interpretation that policies of insurance are to be construed most strongly against the insurers who frame them."

Accident Ins. Co. v. *Crandal*, 120 U. S. 527, 533, 30 L. Ed. 740, 7 Sup. Ct. 685, 688.

The Honorable Judge Minton in speaking for the Court of Appeals for the Seventh Circuit, in the case of *Bull* v. *Sun Life Assurance Co.*, 141 Fed. (2nd) 456, well said:

"This is a legal question that requires us to construe the contract of insurance. It is elementary that such contracts are strictly construed against the Insurance Company. Unless the *clear* and *reasonable* construction of this contract supports the contention of the defendant, we must affirm the District Court." (Italics ours.)

141 Fed. (2nd) at page 457.

In *Johnson* v. *Maryland Casualty Company*, 125 Fed. (2d) 337, the Court said:

"But appellee says this would lead to an absurd construction, and the policy would then cover anyone who might be driving one of Swift and Company's automobiles, even a thief. If that be true, it is the contract which the appellee drew. If it leads to an absurd situation, the company cannot advance that absurdity to relieve it of liability to one whose situation is not absurd."

Id: *Allor* v. *Dubay* (*Keystone Mut. Casualty Co.*), 317 Mich. 281, 26 N. W. (2nd) 772.

In ***Preferred Acc. Ins. Co.*** **v. *Rhodenbaugh,* 160 Fed. (2nd) 832 (6th Cir.), the Court held:**

> **"If insurer which wrote policy insuring those engaged in flight testing of aircraft, desired exclusion of ground crew members from coverage of policy, it had *duty* to include *such precise limitations* in the policy, and where it failed to exclude such coverage, it could not successfully claim that policy did not protect ground crew members."**

and the Court then said:

> "If two constructions may reasonably be employed, the courts, uniformly enforce the one favorable to insured."

Citing:

> *Aschenbrenner* v. *U. S. Fidelity & Guaranty Co.,* 292 U. S. 80, 84, 54 Sup. Ct. 590, 78 L. Ed. 1137, etc.
>
> 160 Fed. (2nd) at page 836.

In *Hayes* v. *Home Life Ins. Co.,* 168 Fed. (2nd) 152, (District of Columbia, March 8, 1948), the court said:

> "Those companies are equipped with able counsel and other experts in the field * * * From their point of view, there is not the slightest reason why the terms of a contract should not be *crystal clear.*"
>
> Id: *Phoenix Mutual Life Ins. Co.* v. *Flynn,* 171 Fed. (2nd) 982, 984, 985.

In *Hooper* v. *State Mutual Life Co.,* 318 Mich. 384, at page 393, 28 N. W. (2nd) 331, at page 334, the Court said:

> "The policy in this case was prepared, printed and brought to the insured by the defendant for the insured's acceptance. Under such circumstances, the *ambiguity* must be resolved against the insurance company." Citing:
>
> *Accident Insurance Co.* v. *Crandal,* 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740.

"There is no question but that, in a case of *ambiguity,* the language must be *strongly construed* against the insurer. The courts have no patience with attempts by a paid insurer to escape liability by taking advantage of an ambiguity, a hidden meaning, or a *forced construction* of the language in a policy, when all question might have been avoided by a more generous or plainer use of words. We have gone far in denying any such defense on the part of an insurance company."

In the recent case of:

DeLand v. *Fidelity Health & Acc. Ins. Co.,* 325 Mich. 9, 37 N. W. (2d) 693, p. 697 (May, 1949),

the Michigan Supreme Court quoting from *Schultz* v. *Benefit Assn.,* 175 S. C. 182, 178 S. E. 867, 868, said:

"The two theories of the policy are inconsistent and the terms of the same are at least inconsistent. * * * The policy is ambiguous. It is a *trap to catch the unwary.* It was conceived, according to the undisputed testimony, for the purpose of *competing* with other companies in an effort to hold out the belief that the policy was substantial and noncancellable. * * * Under the well recognized rules of *this and of other enlightened jurisdictions,* the policyholder must be protected against *confusing statements,* in policies, and, wherever there are two constructions that can be placed upon the policy, the construction most favorable to the policyholder will be adopted."

And held further:

"In *Pietrantonio* v. *Travelers Ins. Co.,* 282 Mich. 111, 275 N. W. 786, 788, the law applicable to the instant case is stated as follows: 'It is a principle of law too well established in this jurisdiction and others to need discussion or citation of authorities, that a policy of insurance couched in language chosen by the insurer must be given the construction of which it is susceptible most favorable to the insured; that technical constructions of policies of insurance are not

favored; and that *exceptions* in an insurance policy *to the general liability* provided for are to be *strictly construed against the insurer. Pawlicki* v. *Hollenbeck,* 250 Mich. 38, 229 N. W. 626.' " (Italics ours.)

V.

Analysis of the Cases.

The Aviation Exclusion Clause Applies Only to Civilian Aviation.

The cases cited and relied upon by defendant, respondent, and which were cited and adopted by the District Court in its Opinion and accepted by the Court of Appeals in the instant *Burns* case in denying recovery to them, are readily distinguishable on the FACTS as we point out in the following analysis thereof. We submit that those cases actually sustain and support plaintiffs' position herein.

The New York Cases Actually Sustain Plaintiffs Herein.

The Courts Below Misconstrued the Facts and Law of the New York Case of Durland v. New York Life Insurance Company, 186 Misc. 580, 61 N. Y. S. (2nd) 700, as Well as Other Cases Cited.

With all due respect for the District Court and Court of Appeals in the instant case, we most respectfully submit that the District Court erred in construing and applying the facts and law of cases cited in the Opinion filed herein, (32 *et seq.*) and in holding that "the above cited case of *Durland* v. *New York Life Insurance Co.,* sustains the defendant's position * * *" (39).

The Durland case, 186 Misc. 580, 61 N. Y. Supp. (2nd) 700:

An analysis of the *Durland* case shows that it is *decidedly* an *authority in favor of plaintiffs* in the instant *Burns* case, as we further demonstrate. Each of the two policies of insurance in the *Durland* case contained the following clause:

"Residence, Travel and Occupation. This policy is free of conditions as to residence, travel, occupation, and MILITARY OR NAVAL SERVICE, except as to the provisions and conditions relating to Double Indemnity Benefit."

The above quoted provision of the policy is followed by an *interlined imprint of a rubber stamp reading*:

"Except as provided by AVIATION RIDER *attached hereto."*

The attached Aviation Rider so referred to, provides:

"Anything in this policy to the contrary notwithstanding, the death of the insured as a result directly or indirectly from operating or riding in any kind of aircraft, whether as a passenger otherwise * * * is a risk not assumed under this policy."

The Court said and held:

"HAD THE CONTRACT CONTAINED ONLY THE MILITARY OR NAVAL SERVICE CLAUSE AND THE AVIATION RIDER, IT MIGHT WELL BE A SUFFICIENT AMBIGUITY WOULD BE PRESENTED TO PERMIT THE CONSTRUCTION THAT INSURED WAS COVERED IN ALL RISKS IN THE NAVAL SERVICE INCLUDING AVIATION, AND FURTHER, THAT THE AVIATION RIDER WAS INTENDED TO RELATE ONLY TO CIVILIAN AVIATION. (Citing cases.)

"It would seem therefore, that the question whether the risk of death in the naval service was limited by the rubber stamp imprinted words to risks other than those excluded by the aviation rider, presents the crux of this litigation.

"When insured received the policies it is not likely that he believed or assumed that the defendant had not excluded from its risk aviation in the naval or military service.

"It is my conclusion that the policy is not ambiguous in respect to aviation coverage. The true intent of the parties was that the risks of military or naval service covered by the policy were limited to such

service risks other than the aviation excluded from coverage by the aviation rider. (Citing cases of *Green* v. *Mutual Benefit Life Insurance Company* and *Hyfer* v. *Metropolitan Life Insurance Company.*)"

From this case, it will be clearly observed that:

1. The policy permitted MILITARY AND NAVAL SERVICE:
2. Except as to AVIATION excluded by the AVIATION RIDER, (*per the interlined imprint of the rubber stamp*).

Reading these two provisions together, as the Court did, the Court held that death due to aviation in the naval service, was not covered, because of such *expressed* exception and exclusion; whereas in the case at bar no such exception or intention is so indicated or contained in the policy. In fact the language in the first paragraph above quoted from the *Durland* case covers the situation in the case at bar.

Paradies v. Travelers Ins. Co., 183 Misc. 887, 52 N. Y. Supp. (2nd) 290, is an authority in our favor. The policy in the *Paradies* case contained an incontestability provision very similar to the Michigan statutory provision heretofore cited herein. The policy also contained an aviation clause excluding liability reading: "Death as a result, directly or indirectly, of service, travel, or flight in any species of aircraft * * *."

The court held that the aviation exclusion clause applied *solely* to CIVILIAN aviation.

Id: *Schifter* v. *Commercial Travelers Acc. Assn.*, 183 Misc. 74, 50 N. Y. Supp. (2nd) 376; affirmed in 269 App. Div. 706, 54 N. Y. Supp. (2nd) 408; appeal denied in 294 N. Y. 645, 61 N. E. (2nd) 460.

We have quoted from the *Paradies* and *Schifter* cases at the outset of this Brief, (p. 18).

The case of:

Thoma v. New York Life Ins. Co., R. Pa. 30 Northampton Co. 369 (1946) 11 C. C. H. Life Health Accident Cases 993,

is very similar to and contains like material policy provisions as the *Durland* (N. Y.) case and is *favorable to our* position here, because:

(1) The assured executed a written application wherein he *expressly agreed* that an aviation rider should be attached to the policy excluding that coverage;

(2) The application also provided:

"The *Incontestability Clause* contained in this policy is hereby *amended* so as to except also the provisions and conditions relating to aviation contained in said Permanent Aviation Clause."

In the *Thoma* case, the stipulated facts agreed upon were that "while the bomber plane so operated by the insured Thoma was in flight over Germany, it was subjected to anti-aircraft defense, and a fragmented shell or bullet struck the insured, mortally wounding him, and he died while his aircraft was still in flight over Germany."

The above *facts* render the decision in conflict with and contrary to the decision of *Boye* v. *United Services Life Ins. Co.*, 168 Fed. (2d) 570, except for the express stipulations contained in the Application, *supra.* The court refers to the *limited* risk applied and paid for by Thoma.

(3) The court in the **Thoma** case further pointed out:

"The aviation rider is incorporated into the policy by the following provision:

'Residence, Travel and Occupation—This policy is *free* of conditions as to residence, travel, occupation, and *military or naval service. Except as provided by aviation rider attached hereto'.*

The last mentioned words italicized, 'were endorsed on the printed policy by a rubber stamp'."

So, we have the controlling *"except" of the rubber stamp endorsement* on the policies in both the *Durland* and *Thoma* cases.

With respect to the rubber stamp "except" so stamped and placed on the policy, the case of *Provident Life & Accident Co.* v. *Anderson,* 166 Fed. (2d) 492, which was relied on by defendant, announces the extreme importance and effect thereof. The Court held and said:

> "A stamped notation on the policy is a part of the contract of insurance. Some courts have held that the stamped words are controlling even when they are in conflict with the printed provisions of the policy.
>
> "Indeed, the fact that this notation had been made by means of a rubber stamp should serve to distinguish from the printed portions of the page and to attract the attention of a reader of the policy."

Provident Life Ins. Co. v. Anderson, 166 Fed. (2nd) 492 (4th Cir.):

The above case of *Provident Life Ins. Co.* v. *Anderson,* 166 Fed. (2d) 492, relied upon by defendant, is indeed authority for plaintiffs Burns, and NOT for defendant herein. In that case, the insured was killed as a result of piloting his *own* plane. The policy contained four consecutively numbered aviation exclusion clauses, the third clause expressly providing against coverage if death occurred "as a result of operating or riding in any kind of aircraft * * *", and the other three clauses referred to *war* activities. Thus we have an insurer's expressed intention to exclude both MILITARY AND CIVILIAN flying in separate numbered clauses, thus recognizing clearly that there is a difference and distinction between MILITARY and CIVILIAN aviation exclusion clauses. And so the court held that the policy did expressly include a CIVILIAN exclusion clause, as well as WAR AND MILITARY aviation exclusion clauses.

In the above case it is also significant to observe that the insurance company was careful to see to it that both its CIVILIAN and MILITARY aviation exclusion provisions were not only made a part of the provisions of the face of the policy, but that such exclusion clauses (provisions) were also appended to and made part of the *incontestability* clause.

Wilmington Trust Co. v. Mutual Life Ins. Co., 68 Fed. Supp. 83, sc 76 Fed. Supp. 560; affirmed by the Court of Appeals, in 177 Fed. (2nd) 404 (3rd Cir).

Defendant, respondent in the instant *Burns* case, cite and vigorously rely upon the case of *Wilmington Trust Company* v. *Mutual Life Ins. Co.*, 76 Fed. 560, as affirmed by the Court of Appeals. And the District Court in the instant case (41) also cites the *Wilmington* case as an authority for defendant, respondent. Reference is therein made to the statement found in the *note* to the *Wilmington* case, 76 Fed. Supp. at page 564, to the effect that the above cited *Paradies* case holds contrary to the *Wilmington* case, and that the *Durland* case from New York sustains the Delaware Court in said *Wilmington* case.

We quote the *note* above referred to as follows:

> "The contrary authority appears to be *Paradies* v. *Travelers Ins. Co.* (*supra*). *Durland* v. *New York Life Ins. Co., supra,* was decided two years after the *Paradies* case and by a higher ranking tribunal."

In the above mentioned *Wilmington* case, the Delaware District Court further said:

> "The *Durland* case, *supra,* decided by the New York court must also be taken to represent the law of New York, another jurisdiction greatly respected by the Delaware Courts,"

and the Delaware Court did just exactly that in arriving at its decision.

However, in so doing, we respectfully submit that the District Court in the *Wilmington* case erred in arriving at its decision adverse to plaintiff, because the *Durland* case is NOT contra to the *Paradies* case, and the *Durland* case was misconstrued by that court as well by the Court of Appeals (see our analysis of the Opinion of the Court of Appeals, *infra*), and also by the District Court and Court of Appeals in the instant *Burns* case. The Delaware Court and the District Court in the instant *Burns* case (39, 41) also cite and rely upon the *Thoma, Hyfer* and *Knouse* cases (76 Fed. Supp. at page 564).

We point out in this Brief, that all those cases are *not* authorities for defendant, but on the contrary a careful analysis as we have attempted herein, shows that all those cases are actually authorities for these plaintiffs, petitioners. The *Durland* case was certainly properly decided in favor of the insurer because of the specific provisions of the policy, including *particularly,* the rubber stamp imprint thereon.

In so deciding, and rendering its Opinion accordingly, the Court of Appeals actually sustains our contention and views in the instant case. The Court (C. J. Biggs) says:

> "There are cases * * * and *Paradies* v. *Travelers Ins. Co.*, 52 N. Y. Supp. 290 (Erratum: which should be 52 N. Y. Supp. (*2nd*) 290), which are very close to the plaintiff's position. The *Paradies case cannot be so distinguished* but the authority of Paradies is greatly diminished by the decision of the Supreme Court of New York, a higher ranking tribunal, in *Dorland* v. *New York Life Insurance Co.*, 61 N. Y. S. 2d 700."

Again we emphasize that the *Paradies* case is *not* "diminished" in any degree by the decision in the *Durland* case, but is 100% in accord therewith, because the provisions of the policy in the *Durland* case expressly excluded coverage and liability if death resulted from aviation in the military or naval service.

Sustaining our contention here, the court in the *Durland* case well said:

> **"Had the contract contained only the military or naval service clause and the aviation rider, it might well be a sufficient ambiguity would be presented to permit the construction that insured was covered in all risks in the naval service including aviation, and further, that the aviation rider was intended to relate only to civilian aviation."**

And, in support of the last quoted statement, the Supreme Court of New York cites the cases of:

Sovereign Camp Woodmen v. *Compton,* 140 Ark. 313, 215 S. W. 672.

Paradies v. *Travelers Ins. Co.,* 183 Misc. 887, 52 N. Y. Supp. (2nd) 290.

Schifter v. *Commercial Travelers Acc. Assn.,* 183 Misc. 74, 50 N. Y. Supp. (2nd) 376; affirmed 269 App. Div. 706, 54 N. Y. Supp. (2nd) 408, appeal denied, 294 N. Y. 645, 61 N. E. (2nd) 460.

With all due respect, we wish to employ the same expressions of the District Court in our case and of the courts in the *Wilmington* case, and aver that the *Schifter* case was affirmed "by a court of higher rank" than the court in either the *Paradies* or *Durland* cases, and that subsequently further review thereof was denied by the high ranking tribunal in 294 N. Y. 645, 61 N. E. (3rd) 460. There is unanimous accord in all of the New York cases, definitely permitting and justifying recovery by the plaintiffs, Burns, in the instant case.

In **Rossman v. Metropolitan Life Ins. Co.,** (Maine) 71 Fed. Supp. 592, deceased also met his death while piloting *his own* plane.

The question of whether the exclusion clause or "Pro-

vision" above referred to, applied to one flying in a military plane while in the military service *is not involved,* and the FACTS are not similar at all to the *Burns* case.

Defendant also contends that the case of **Boye v. United Service Life Insurance Co.** ,168 Fed. (2nd) 570 (certiorari denied in 335 U. S. 828, 93 L. Ed. 25, 69 Sup. Ct. 54) is in its favor. We desire to point out why that case is an authority for plaintiffs and not for defendant:

The District Court held there could be no recovery because of the aviation exclusion clause which limited recovery to premiums paid if death was "due to operating or riding in any kind of aircraft." On Appeal the Circuit Court of Appeals allowed recovery and said:

> "We agree with the District Court that the known circumstances point strongly to death by enemy gunfire, or by flames from a burning plane or by the plane crashing upon the land or falling into the sea. There was certainly no proof that death was *not* so caused. But we cannot agree that death so caused is 'due to operating or riding in any kind of aircraft.' It follows that appellee failed to establish the defense on which it relies."

Furthermore, it is very significant to take cognizance of the following: The Burns policy was issued September 13, 1941, and the Boye policy was issued October 1, 1941.

Quoting from the contention of the insurer in the *Boye* case, *supra,* 168 Fed. (2nd) at page 570:

> "Anyway, it has been the practice of the insurance industry for many years except in time of war or impending war to refrain from excluding hazards incident to war."

It is our opinion that in view of the language and holding of the court in the *Boye* case, the further statement of the court that death was "not from a risk of aviation that the policy did exclude" is simply *obiter dicta.*

The *Boye* case also distinguishes the cases cited and relied upon by defendant wherein the exclusion clause provides for "*service* * * * in any species of aircraft," which the court stated plainly covers war service not merely "travel or flight."

Ruddock v. Detroit Life Ins. Co., 209 Mich. 638, 177 N. W. 242:

The *Ruddock* case does not involve a case of death due to *aviation* nor an aviation exclusion clause.

On July 26, 1918, insured was inducted into the military service of the United States. On October 9, he died at Camp Custer, of pneumonia.

This case is similar to *Thoma* v. *New York Life Ins. Co.*, R. Pa. 30 Northampton Co. 360, which is analyzed herein.

The court further said:

> "The parties had the right to draw the line where liability would cease in time of war. They drew it as the point where the insured entered 'military service,' when he was inducted into that service."

The Hyfer Case.

In the *Hyfer* v. *Metropolitan Life Ins. Co.* case, 318 Mass. 174, 61 N. E. (2d) 3, the Court held that the contract was made in Massachusetts, even though issued in New York, and its interpretation governed by Massachusetts law.

In the *Hyfer* case, the court says:

> "While the plaintiff contends that New York law governs the construction of the policy, we see no reason to believe that a different result should be reached under New York law."

However, this statement by the Court likewise is not correct, because as we have indicated and clearly pointed out

in this Brief, the New York court in the case of *Paradies* v. *Travelers Ins. Co.*, 183 Misc. 887, 52 N. Y. Supp. (2d) 290, held that the aviation clause which was even more comprehensive than it is in the *Burns* case, by reason of the fact that it includes the word "*service* • • • in any species of aircraft," held that such aviation exclusion clause referred to CIVILIAN flying only, and *Durland* v. *New York Life Ins. Co.*, 186 Misc. 580, 61 N. Y. Supp. (2d) 700, is fortified by similar provisions of the policy containing *an imprint of a rubber stamp which expressly excluded military aviation* from coverage, namely, the case of *Thoma* v. *New York Life Ins. Co.*, R. Pa. 30 Northampton Co. 369 (1946), 11 C. C. H. Life, Health & Accident Cases 993.

Thus, if the *interlined imprint of the rubber stamp* which excepted from coverage military or naval service, had not been stamped on the policy, the New York Court in the *Durland* case would have held the same as the Court did in the New York *Paradies* case, and both cases thus plainly determine the same issue here, in favor of Burns.

The Head Case.

There was a single flight by the insured, Head, with an airplane owner, on May 4, 1909, on a *single business mission.* MILITARY AVIATION IS NOT INVOLVED in the *Head* case.

Knouse v. Equitable Life Ins. Co., 163 Kan. 213, 181 Pac. (2nd) 310:

As to the *Knouse* case, defendant ignores the inapplicability thereof to the FACTS in the instant *Burns* case. Such distinguishing feature is clarified by the case of *Boye* v. *United Service Life Ins. Co.*, 168 Fed. (2nd) 570, 571, certiorari denied, 335 U. S. 828, 93 L. Ed. 25, 69 Sup. Ct. 54, cited *supra,* in which latter case the court says:

> "In *Knouse* v. *Equitable Life Ins. Co.*, 163 Kan. 213, 181 Pac. (2nd) 310, 311, on which appellee (defendant

herein) relies, both the policy and the event were quite different from the ones before us. The policy there excluded 'death as a result, directly or indirectly, of *service*, travel or flight in any species of aircraft.' '*Service* • • • in any species of aircraft' plainly covers war service, not merely 'travel or flight'."

It will be further noted that three (3) members of the Kansas Supreme Court dissented in the *Knouse* case.

Order of United Commercial Travelers v. King, 161 Fed. (2nd) 108:

It will be noted that in this *King* case, the policy excluded liability "for death resulting from participation, as a *passenger or otherwise*, in aviation or aeronautics • • •," and furthermore, *the point was not raised nor any issue made* as to the *distinction* between CIVILIAN aviation on the one hand, and aviation in the MILITARY OR NAVAL SERVICE on the other.

On review, 333 U. S. 153, 92 L. Ed. 479, 68 Sup. Ct. 488, this Court said:

> "In affirming the decision below, we are deciding only that the Circuit Court of Appeals did not have to follow the decision of the *Court of Common Pleas of Spartanburg County*. We do *not* purport to determine the correctness of its ruling on the *merits*."
>
> 333 U. S. at page 162.

> "Effectuation of that policy is comparatively easy when the issue confronting the federal court has previously been decided by the *highest court* in the appropriate state; the *Erie R. Co.* case decided that decisions and opinions of that court are binding on federal courts."
>
> 333 U. S. at page 158.

Green v. Mutual Benefit Life Ins. Co., 144 Fed. (2nd) 55:

The following language of the court in the *Green* case is apropos here, and certainly sustains our views in the instant case, viz.:

> "Since Green was not, at the date of his application, in military service and did not then contemplate engaging in such service within the ensuing year, *the company decided not to include a military risk exclusion clause.* SUCH A CLAUSE WOULD HAVE EXCLUDED FROM COVERAGE NOT ONLY THE RISKS OF DEATH FROM PARTICIPATION IN MILITARY AVIATION BUT ALSO THE OTHER MULTIFARIOUS RISKS ATTENDANT UPON MILITARY SERVICE, WHETHER SUCH SERVICE WERE IN THE AIR, OR ON THE GROUND OR UNDER THE SEA. But Green's application disclosed that he contemplated training as an airplane pilot not merely an occasional flight as a fare-paying passenger. *On the basis of this information* it was for the company to say how far it was willing to undertake the risks of aerial flight."

In the light of the foregoing language of the Court, it is impossible to reconcile or understand how the court came to its decision in favor of defendant.

On the other hand, it is also significant to note the following additional comments of the Court in the *Green* case, supporting our analysis, namely:

> "There were a number of printed questions on the application form designed to elicit information as to the applicant's past experience with aviation and his *expectations* as to *future* participation in aerial flight. Green stated * * * that he contemplated further flights within the ensuing year; that he did not have a student's or pilot's license, but contemplated taking the regular training course in flying offered by the Civil Aeronautics Administration.
>
> "We do not doubt appellant's proposition that the courts must look to the *entire* policy, *including the*

> *application* which is made a part of it, 'FOR A TRUE UNDERSTANDING OF WHAT RISKS WERE ASSUMED BY THE COMPANY AND WHAT RISKS WERE MEANT AND UNDERSTOOD TO BE EXCLUDED WHEN THE COMPANY WROTE AND THE INSURED ACCEPTED THE CONTRACT.' And it is superfluous to cite authority for the familiar rule that any *ambiguities* in the language of the policy *are to be resolved against the insurer.*"

As herein pointed out we have clearly demonstrated that in the case at bar, Burns stated in his Supplement to Application which was made a part of the policy, that he contemplated NO flights, and the inquiries contained in said application related only to PERSONAL AND PRIVATE flying (Questions 7 and 8 of the Supplement to Application—the *Aviation* Application (30)).

Conclusion.

From the foregoing, we respectfully submit that the Court of Appeals for the Sixth Circuit has now rendered a decision in conflict with controlling and applicable decisions of this Court, with its own previous decisions, with decisions of other Federal Courts, with decisions of the Supreme Court of Michigan, with leading text writers of law applicable to this contract of insurance, in a case of great public and economic importance, and which decision has seriously prejudiced not only the rights of petitioners, but unquestionably of a very great many other citizens who procured insurance policies while in civilian life and who later became war casualties, and their beneficiaries have been and will be deprived of and unable to realize the fruits of their dire efforts, as was so well expressed by Mr. Justice Cardozo on behalf of this Court in the case of *Burnet* v. *Wells*, 289 U. S. 670, at page 681, to which we again respectfully refer because of its extremely pertinent application, namely:

"Insurance for dependents is today in the thought of many a pressing social duty. Even if not a duty it is a common item in the family budget, kept up very often at the cost of painful sacrifice, and abandoned only under dire compulsion."

RELIEF PRAYED FOR.

Petitioners therefore respectfully pray that their Petition for the Writ of Certiorari be granted, and that the writ issue to the Court of Appeals for the Sixth Circuit to correct its error, and that its decision and judgment be reversed and judgment be entered in favor of plaintiffs, petitioners, for the full amount of the face of the policy of $5,000.00 together with interest thereon at the rate of 5% per annum from July 1, 1943.

Most respectfully submitted,

SOLOMON W. PATEK,
RALPH E. HELPER,
MOSES LEVITAN,
Counsel for Petitioners.

APPENDIX.

Decision and Judgment of the Court of Appeals for the Sixth Circuit.

CAUSE ARGUED AND SUBMITTED.
December 6, 1949.

Before Hicks, Chief Judge; Martin and Miller, Circuit Judges.

This cause is argued by S. W. Patek for appellants and by Ivan D. Wright for appellee and is submitted to the court.

JUDGMENT entered December 8, 1949.

This cause was heard upon the transcript of record, briefs, and arguments of counsel, and the court being of the opinion that there is no reversible error in the record.

IT IS ORDERED AND ADJUDGED that the judgment entered in the District Court on September 20, 1948, and the amended judgment entered on September 30, 1948, both of which judgments are herein appealed from, are affirmed upon the grounds and for the reasons set out in the opinion of the District Court filed September 20, 1948.